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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GENNARO ANGIULO, FRANCESCO ANGIULO,
DONATO ANGIULO, and MICHELE ANGIULO,

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE REFUSAL TO IMMUNIZE THE ALLEGED VICTIM OF AN EXTORTIONATE CREDIT TRANSACTION CALLED AS A DEFENSE WITNESS IS CONSISTENT WITH THE DICTATES OF DUE PROCESS OF LAW?

2. WHETHER A TRIAL COURT'S INSTRUCTIONS ON AN EXTORTIONATE CREDIT TRANSACTION COUNT WHICH PERMITTED THE JURY TO CONVICT ON A THEORY ON WHICH THE DEFENDANTS WERE NOT INDICTED NOR TRIED CAN PASS CONSTITUTIONAL MUSTER?

3. WHETHER A TRIAL COURT CAN DECIDE AS A MATTER OF LAW THAT THE GOVERNMENT HAS PROVED SEPARATE AND DISTINCT §1955 GAMBLING BUSINESSES AND REFUSE TO SUBMIT THE ISSUE TO THE JURY?

4. WHETHER A TRIAL COURT CAN REFUSE TO INSTRUCT THE JURY ON THE THEORY OF DEFENSE - MISTAKEN VOICE IDENTIFICATION - WHEN THERE IS CLEAR SUPPORT FOR THAT THEORY IN THE EVIDENCE?

5. WHETHER THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT OF RICO IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE CONDUCT OF THE PETITIONERS, WHEN THE PREDICATE ACTS ALLEGED IN THE INDICTMENT WERE NOT RELATED TO EACH OTHER, BUT ONLY RELATED TO THE ALLEGED ENTERPRISE?

TABLE OF CONTENTS

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 12

REASONS WHY THE WRIT SHOULD BE GRANTED 31

ARGUMENT 33

I. THE TRIAL COURT ERRED IN NOT ORDERING IMMUNITY FOR THE ALLEGED VICTIM OF AN EXTORTIONATE CREDIT TRANSACTION, JOSEPH PALLADINO. 33

II. THE TRIAL COURT'S INSTRUCTION ON COUNT 12 PERMITTING CONVICTION OF THE PETITIONERS ON THE SMOOT EXTORTIONATE CREDIT COUNT FOR CONDUCT NOT ALLEGED THEREIN VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS. . . . 36

III. THE TRIAL COURT INVADED THE PROVENCE OF THE JURY BY DECIDING IN EFFECT THAT THE GOVERNMENT HAD PROVED FIVE SEPARATE §1955 GAMBLING BUSINESSES AS A MATTER OF LAW AND REFUSING TO SUBMIT THE ISSUE FOR THE JURY'S CONSIDERATION. . . . 43

IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF MISTAKEN VOICE IDENTIFICATIONS. . . . 47

V. THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT OF THE RICO STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE. 49

CONCLUSION 55

TABLE OF AUTHORITIES

Page

CASES

Bird v. United States, 180 U.S. 356 (1901) 48

Brown v. Ohio, 432 U.S. 161 (1977) 44

Connally v. General Construction Co., 269 U.S. 385 (1926) 50

DeJonge v. Oregon, 299 U.S. 353 (1937) 41

Dunn v. United States, 442 U.S. 100 (1979) 32, 41, 43

H.J. Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S. Ct. 2893 (1989) 50, 51, 52, 53

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 54

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 50

Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987) 34

Sanabria v. United States, 437 U.S. 54 (1978) 32, 43, 44

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 50, 51, 52

United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990) 2

United States v. Campanale, 518 F.2d 352 cert. denied, 423 U.S. 1050 (1975) 52

United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990) 46

United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984) 46

United States v. Gibson, 726 F.2d 869 (1st Cir.), cert. denied, 466 U.S. 960 (1984) 45

United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978) 47

United States v. McMahon, 861 F.2d 8 (1st Cir. 1988) 41

United States v. Morrison, 535 F.2d 223 (3rd Cir. 1979) 35

United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985) 34

United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984) 46

Webb v. Texas, 409 U.S. 95 (1972) 34

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PETITION FOR WRIT OF CERTIORARI
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Petitioners Gennaro, Francesco, Donato, and Michele Angiulo pray that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in

this case on March 5, 1990.[1]

OPINION BELOW

Petitioners' appeal from their convictions in the United States District Court for the District of Massachusetts was heard by a panel of the First Circuit and said convictions were affirmed, United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990), reproduced in the Joint Appendix at 1A to 110a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 5, 1990. Timely petitions for rehearing on behalf of Samuel Granito and the United States were denied on March 26,

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[1] The other appellant in the First Circuit was Samuel Granito. He has also filed a petition for writ of certiorari and a Joint Appendix on which the petitioners here also rely.

1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. § 1961(5) (West 1984) provides:

> "pattern of racketeering activity"

> requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .
>
> * * * * *

Title 18 U.S.C. § 1962(c) and § 1962(d)(West 1984 & Supp. 1990) provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

On September 19, 1983 a grand jury sitting in the District of Massachusetts returned a twenty count indictment against Gennaro, Francesco, Donato, and Michele Angiulo and three other defendants. Gennaro Angiulo was named in sixteen counts of the indictment, charging him with RICO violations,[2] 18 U.S.C. §1961 et seq.; operating five illegal gambling businesses (numbers betting, North Margin Street card game, Lowell barbooth, Boston barbooth, and Las Vegas nights), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 18 U.S.C. §894(a); the use of extortionate means of collection (Palladino); conspiracy to use

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[2] The predicate acts alleged against Gennaro Angiulo in the RICO charges included the various federal charges also alleged as separate counts, and several murders and conspiracies to murder.

extortionate means of collection (Palladino), 18 U.S.C. §894(a); interstate travel to facilitate gambling, 18 U.S.C. §1952; obstruction of state justice (Roxbury court); 18 U.S.C. §1511; obstruction of justice (LaFreniere and Venios), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Francesco Angiulo was named in thirteen counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating five illegal gambling businesses (numbers betting, North Margin Street card game, Lowell barbooth, Boston barbooth, and Las Vegas nights), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 18 U.S.C. §892(a); conspiracy to use extortionate means of collection (Palladino), 18 U.S.C. §894(a); obstruction of state justice (Roxbury court), 18 U.S.C. §1511;

obstruction of justice (LaFreniere), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Donato Angiulo was named in eight counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating an illegal gambling business (numbers betting), 18 U.S.C. §1955; conspiracy to make extortionate extensions of credit (Smoot and Palladino), 19 U.S.C. §892(a); conspiracy to use extortionate means of collection (Palladino), 18 U.S.C. §894(a); obstruction of justice (LaFreniere), 18 U.S.C. §1503; and conspiracy to obstruct justice (LaFreniere), 18 U.S.C. §371.

Michele Angiulo was named in four counts of the indictment, charging him with RICO violations, 18 U.S.C. §1961 et seq.; operating an illegal gambling business (numbers betting), 18 U.S.C. §1955; and

conspiracy to obstruct state justice (Roxbury court), 18 U.S.C. §1511.

Gennaro, Francesco, Donato, and Michele Angiulo and two other defendants[3] proceeded to trial before Judge Nelson and a jury, with empanelment beginning on June 11, 1985. Shortly after the evidentiary presentation to the jury began, defendant Ilario Zannino's case was mistried because of his ill health. The jury returned its verdicts on February 26, 1986. Gennaro Angiulo was found guilty on all but four counts, Lowell barbooth, interstate travel, obstruction of state justice, and obstruction of justice (Venios). The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Francesco Angiulo was found guilty of

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[3] Defendant Vittore Nicolo Angiulo was severed because of ill health. He died before ever being brought to trial.

the RICO substantive and conspiracy counts, four gambling counts (all but Boston barbooth), and the three counts involving extortionate credit. He was acquitted of the three counts charging obstruction of justice (Roxbury court and LaFreniere) and of Boston barbooth. The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Donato Angiulo was found guilty of the RICO substantive and conspiracy counts, the numbers betting count, and the Smoot extortionate credit count. He was acquitted on the other charges. The jury also returned a special verdict on items the government alleged to be subject to forfeiture.

Michele Angiulo was acquitted of all charges except the numbers betting count.

On April 3, 1986 Gennaro Angiulo was sentenced to twenty years on the RICO

conspiracy count, a consecutive five year term on the numbers betting count, a consecutive fifteen year term on the Smoot extortionate credit count, and a consecutive five year term on the LaFreniere conspiracy to obstruct justice count. On the other counts he received sentences that were concurrent with the consecutive sentences. In addition to forty-five years of imprisonment, committed fines of one hundred twenty thousand dollars were also imposed.

On April 3, 1986 Francesco Angiulo was sentenced to a ten year term on count one, the RICO conspiracy count, a consecutive five year term on the numbers betting count, and a consecutive ten year term on the Smoot extortionate credit count. On the other counts he received sentences that were concurrent with one of the consecutive sentences. In addition to twenty-five years of imprisonment, committed fines totalling

sixty thousand dollars were also imposed.

On April 3, 1986 Donato Angiulo was sentenced to twenty years imprisonment on Count two, the RICO substantive count, and concurrent terms on the other counts. Fines totalling forty thousand dollars were also imposed.

On April 3, 1986 Michele Angiulo was sentenced to three years imprisonment and a committed fine of five thousand dollars on that count.

The evidentiary facts are briefly discussed in the panel opinion of the First Circuit, but only in the light most favorable to the government. The jury rejected a good deal of the government's evidence by returning fifteen not guilty verdicts, highlighting the importance of appropriate legal rulings even in a "mega-trial".

STATEMENT OF THE FACTS

Palladino

In preparation for the Palladino extortionate credit aspect of its case the government subpoenaed Joseph Palladino's attorney, Regina Quinlan. She responded by filing a motion to quash. In resisting that motion the government filed with the court its Memorandum In Opposition To Attorney Regina Quinlan's Motion To Quash (dated 9/23/85) in which it contended in part as follows at page four:

> "In this case, revealing the name of Attorney Quinlan's client will not implicate him in criminal activity. The Government contends that he was the victim of an extortionate credit transaction, a status which does not subject him to criminal liability." (emphasis in the original).

In discussing whether a stipulation of her testimony could be reached by the parties, the defendants argued that

Palladino, not his attorney, would be the appropriate witness. See Tr. 46:4. At this side bar conference, the government made it clear that it would not call Mr. Palladino because he "would not testify truthfully", see Tr. 46:5, and because he "will do whatever Mr. Gennaro Angiulo tells him to do", see Tr. 46:6-7. A stipulation on Quinlan's testimony was reached and read to the jury. See Tr. 46:87-89.

After the government rested on December 20, 1985, the defendants filed a Motion To Limit Cross-Examination of Prospective Witness, requesting the court to limit the government's permissible cross-examination of Palladino to the area of his proposed direct examination - his alleged status as a loan shark victim. The Motion informed the court that Palladino would assert a Fifth Amendment privilege to other areas of inquiry. The motion was discussed with the

court with the indication being it would be denied, see Tr. 105:51; Tr. 107:93-95, and that Palladino would therefore assert his Fifth Amendment privilege if called as a witness, see Tr. 108:38-41.

The defendants next moved the court for judicial immunity for Palladino. See Defendants' Motion For Judicial Immunity For Defense Witness And Supporting Memorandum Of Points And Authorities. The motion included a proffer of Palladino's clearly exculpatory testimony that he was not the victim of extortionate credit transactions as alleged in counts 13-15.

The government's immediate reaction was to inform the court that both it and Mr. Palladino opposed the motion, and to suggest that the Worcester County District Attorney's Office would be extremely upset with immunity for Palladino because of his

role in the pornography business.[4] See Tr. 45:75.

When the motion was addressed at length later that afternoon the government argued it had made no effort to make Mr. Palladino unavailable because (1) although it had argued that Palladino would lie if called to testify it did not directly communicate that statement to him, and (2) although it had turned over incriminating information about Mr. Palladino's taxes to criminal

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[4] In an article published by the Boston Globe on February 16, 1983 entitled "A rift in organized crime", the Spotlight team claimed to have had access to a summary of an FBI tape recording made of the defendant and two associates in 1981. The article's report of that conversation makes it clear that someone leaked the Palladino tape to the Globe before the indictment was returned in this case. This leak was the subject of a motion made by the defendants and heard by Judge Skinner prior to indictment. See Petition To Terminate The Grand Jury Proceedings, In Re: William Cintolo and Gennaro Angiulo. It is apparent that the program to chill Palladino began long before the trial in this case.

investigators from the I.R.S., it did not know until informed by the defense that Palladino had been told by the I.R.S. that he was under active investigation. See Tr. 115:113, 131-34. The government also pointed out that in its view the tapes established that Palladino was an associate of the Patriarca family of La Cosa Nostra with ties to the Gambino and DeCalvacante families in New York, Tr. 115:135; and that he engaged in interstate associations as part of a nationwide racketeering enterprise, Tr. 115:140. The government did admit that if Palladino did testify that the loan he received was legitimate, that testimony would be exculpatory.[5] See Tr. 115:147.

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[5] Gennaro Angiulo's counsel informed the court that his proffer concerning Palladino's exculpatory testimony was based on his interview of Palladino and others. Tr. 117:10.

The next day the defendants moved orally and in the alternative that the government immunize Palladino. Tr. 116:122. The government took the position that the court had no power to order the government to obtain immunity. Tr. 116:128. The court then questioned Palladino's attorney and Palladino under oath. Palladino claimed the fifth amendment to the court's questions about the loan at issue. See Tr. 126:163-65. His attorney stated that Palladino wouldn't testify even with judicial immunity as long as there was a question about the court's authority to grant such immunity. Tr. 116:187.

The next day his attorney informed the court that Palladino would not even testify in camera because that record could possibly be unsealed in the future, and Palladino testified that he accepted his attorney's advice. See Tr. 117:7-8, 12. The

defendants' motion for immunity was denied. Tr. 118:9.

Smoot

The government's theory at trial was that Donald Smoot was the victim of two separate extortionate extensions of credit in the spring of 1981, one from Ilario Zannino in the amount of fourteen thousand dollars (count 11) and the second from the Angiulos in the same amount (count 12). The government's proof of its theory centered on the testimony of Donald Smoot and one key tape recorded conversation, enhancement 675.[6]

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[6] The petitioners do not concede the accuracy of the transcripts, including the voice identifications. The jury could have reasonably rejected large portions of the government's transcript claims. See for example the government's admission during final argument concerning the so-called LaFreniere murder conversation that the jury may have heard only bits and pieces. Tr. 123:65. Here, however, the government's version of this conversation is presented.

According to the government, on April 30, 1981 at 98 Prince Street the following portion of a conversation occurred.

Gennaro Angiulo:	Leave Smoothie alone. I'm going to .... him.
Ilario Zannino:	No wait till I get my fourteen from him .... .
Gennaro Angiulo:	.... .
Donato Angiulo:	He's gonna bring twelve tonight.
Ilario Zannino:	Good; give it to .... .
Gennaro Angiulo:	Why did you have to say that?
Ilario Zannino:	I know Dominic .... .
Gennaro Angiulo:	I would never say it.
Ilario Zannino:	And tell him he owes two. All right?
Donato Angiulo:	You want that out of here or you w a n t t h a t yourself? Cause he owes you fourteen too. How

many fourteens does he owe?

Ilario Zannino: He owes me fourteen thousand.

Donato Angiulo: Is that the one that's over here?

Ilario Zannino: Yeah. Which one you talking about? There's another one.

Donato Angiulo: That's what I'm talking about. Is there another fourteen?

Ilario Zannino: What did he tell you? Let's get this straightened out.

Dominic Isabella: He showed me a check for .... twelve thousand.

Ilario Zannino: Give who? That must be mine. I don't care, you can take it.

Donato Angiulo: I don't care .... one way or the other.

Gennaro Angiulo: You mean he owes more than one fourteen?

Donato Angiulo: Took me by surprise today.

Unknown Male: Well, I don't blame him if he get his .... .

Ilario Zannino: He told Dominic, he said "Dominic here's one week. I'm gonna give you the other week tomorrow and twelve thousand." Did he tell you that?

Dominic Isabella: Exactly.

Ilario Zannino: Well, take that off of mine and .... . Frank tell him he owes me two, he gives you the twelve. All right?

Gennaro Angiulo: Migel, tomorrow go down the airport and case these tickets and get me all .... off the check .... okay? Take these before .... . Say "listen we didn't use em; we didn't use em. Gimme." Tell em, "gimme the cash;" they give you a check

okay. And here's another one for Eastern here. Cash that too ....

Francesco Angiulo: Let me get this straight .... when he comes he owes me fourteen from the game.

Ilario Zannino: I know that.

Francesco Angiulo: Now which one you want him to pay.

Ilario Zannino: What did he say to you today? He wanted to pay mine first. He told me that last week.

Francesco Angiulo: All right.

Ilario Zannino: All right.

Francesco Angiulo: All right.

Ilario Zannino: So you can ask him. .... "what is this for? Who? Says "Larry". Take it. Tell him "well you owe two more, according to Larry." All right. I keep taking shots with these guys .... make a fucking living. Fuck em.

I haven't .... have I? I took over sixty didn't I? Everyone backed away like fuckin dogs. Guy owes fifteen ....

Gennaro Angiulo: Nothing wrong with that.

Donald Smoot's testimony concerning the existence of a second loan was no more enlightening. He testified that in the spring of 1981 he owed fourteen thousand dollars to Ilario Zannino as a result of losses at the North Margin Street card game. Tr. 51:26. He owed the money for about a month or two. Tr. 57:25. Donato Angiulo would occasionally pick up an interest payment on that loan. Tr. 51:35-36, 49.

He also testified that he would occasionally borrow money from Donato Angiulo and would be charged two and a half percent interest per week. Tr. 51:36. Donato Angiulo would charge him interest

because he didn't want him to gamble. Tr. 51:41. He said that he owed money to Donato Angiulo in 1981. Tr. 51:40. When asked during what period of time in 1981, he replied that when his wife died on Labor Day, he borrowed four thousand dollars as a friend and wasn't charged interest. Tr. 51:40-41. When asked if he borrowed money from Donato Angiulo prior to that time, he again answered, occasionally. Tr. 51:41. This theme was revisited with the government asking how much money he owed Donato Angiulo in the "spring" of 1981, and Smoot again replying, around four thousand dollars. Tr. 51:96. In answer to the question of whether it could have been more, he answered, "It could have." Tr. 51:96. He said he had a running account with Donato Angiulo that went up and down depending on how he was faring in gambling. Tr. 51:96.

In terms of his state of mind, Smoot

testified that he was vaguely aware that if he failed to make a payment he could be threatened with physical harm. Tr. 51:96-97; Tr. 52-75. He testified that he believed Donato Angiulo was connected with organized crime. Tr. 51:118.

On cross-examination Smoot testified that Donato Angiulo and he were life long friends. Tr. 52:31. He said their families were friends, would visit, and still did. Tr. 52:30. Their sons played together, and graduated high school together. Tr. 52:30-31. He described Donato Angiulo as a gentleman. Tr. 52-82. He said he knew that Donato Angiulo would never do anything to cause him any harm. Tr. 52:98-99. He also said that he knew Donato Angiulo knew that he believed that. Tr. 52:99.

Five Gambling Businesses Or One

The defendants first raised the problem of multiple gambling businesses in a pre-trial motion. See Joint Motion Of Defendants To Dismiss And Strike Certain Enumerated Predicate Acts Of Racketeering, filed 2/27/84. The issue was addressed during the cross-examination of the expert gambling witness, Agent Eberhart. See Tr. 26:21-27. At the charge conference the defense alerted the court to its continuing position that the government was not permitted to break one gambling business "into five separate crimes". Tr. 1/16/86:40-41. The defense raised the issue again during Rule 29 arguments, suggesting that the government's evidence showed one gambling enterprise which had various aspects to it. See Tr. 120:102-104. The defendants requested an instruction directing the jury's attention to the

problem of whether the government had proved one gambling business or five separate and distinct businesses. See Francesco Angiulo's Request For Instructions. The trial court's charge on the five alleged §1955 gambling counts, see Tr. 127:67-82, failed to bring this issue to the jury's attention. At the conclusion of the charge, the defendants saved their rights to the failure to give an instruction. Tr. 127:143. On inquiry by the court, the government took the position that there was no need to give a multiple business instruction. Tr. 127:143.

The government's position that a multiple business instruction was not required can only be described as extraordinary. Given its view that the predicate acts enumerated in the indictment were committed in furtherance of the affairs of an enterprise, it is clear as a matter of

simple logic that the evidence was bound to raise the issue of whether each gambling activity charged was an independent business or assimilable into one overall operation.

Voice Identification

At trial the government relied on Agent Quinn for its claim that a defendant was the speaker on tape recorded conversations introduced in evidence. Agent Quinn of the FBI opined that he was familiar with the tone and characteristics of a defendant's voice, and that he was the speaker who made the statements attributed to him in the transcripts of the tape recorded conversations. See Tr. 4:161. Not only was this identification testimony the critical foundation for the tape recorded conversations played to the jury at trial, but also for the government's two key expert witnesses. Both gambling expert Eberhart and La Cosa Nostra expert Nelson assumed the

Quinn voice identifications to be accurate in reaching their expert opinions.

The problem of identifying speakers was a most difficult task. Agent Quinn testified that during the period of surveillance over a hundred individuals entered 98 Prince Street. Tr. 8:179. The video camera could not distinguish between those who entered the front door and went to the second or third floor, and those who went into the first floor apartment where the listening devices were located. See Tr. 7:147-149.

Agent Quinn testified that there was a great deal of background noise on the tapes. Tr. 3:47. The principal cause was a radio which was on during virtually all of the conversations and a television which was on during the majority of the conversations. Tr. 3:47. In addition there was frequent noise made by a CB and also a scanner. Tr.

3:47. The audibility and intelligibility of the tapes was a major issue at trial.

Agent Quinn admitted that some speakers on the tapes were identified one way and subsequently identified as somebody else. Tr. 8:167. He refused to estimate how many times that occurred. Tr. 8:167. Agent Quinn admitted that he had made an identification on two or three tapes of a speaker as Maurice Mizrahi. Tr. 6:44. He had a picture from the video at the time that he thought was a picture of Mizrahi. Tr. 9:22-23. He actually met with Mizrahi. Tr. 9:26. He had made his identification based on speaking with Mizrahi, and on the context. Tr. 6:43. However, after empanelment commenced in the case at bar, he changed his identification of Mizrahi. See Tr. 6:49.

Quinn's failure to equivocate in his identification of a defendant and the

constant reminder of those identifications in the form of transcript attributes made it critical to put his opinion evidence in the proper legal context.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The issue of how to evaluate the refusal to grant immunity to a defense witness has divided the Circuits and is a recurring issue with significant impact on the right to a fair trial. It is difficult to imagine a more fundamental problem for a defendant at a jury trial than the inability, through no fault of his own, to produce the testimony of the alleged victim that he was not a victim at all.

2. The jury instruction given at trial concerning the Smoot extortionate credit transaction permitted the jury to convict on a charge not made against the defendants in the indictment or at trial in

violation of the most basic notions of due process. See Dunn v. United States, 442 U.S. 100, 106 (1979). The sleight of hand analysis of the First Circuit on this issue in effect overrules Dunn.

3. In its holding that the trial court did not have to instruct the jury that the government must prove separate businesses in order to obtain multiple §1955 gambling convictions the First Circuit in effect overruled Sanabria v. United States, 437 U.S. 54 (1978). In addition, the First Circuit's analysis of the trial court's failure to give a theory of defense instruction is in conflict with that of other circuits. The failure to give the requested instruction here would result in reversal in both the Sixth and Ninth Circuits.

4. The question of when a defendant's theory of the case - voice identification

here, can be left out of the trial court's instructions is of fundamental importance. There is a conflict in the Circuits as to the appropriate test to be applied, and the failure here to give an instruction supported by the evidence would have resulted in reversal in both the Sixth and Ninth Circuits.

5. The question of whether or not the RICO Statute gives fair notice as to the meaning of the term "pattern of racketeering activity" is at the heart of the legitimacy of RICO prosecutions.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT ORDERING IMMUNITY FOR THE ALLEGED VICTIM OF AN EXTORTIONATE CREDIT TRANSACTION, JOSEPH PALLADINO.

As discussed at some length in the First Circuit's opinion, the appropriate legal framework for evaluating a claim for defense witness immunity is a subject that

has split the Circuits. See, e.g., United States v. Pennell, 737 F.2d 521, 526 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). This case raises the issue in sharp focus because it was the alleged victim the defense wanted immunized. Under either theory developed in the various circuits - effective defense and prosecutorial misconduct - the witness here should have been immunized.

At a minimum the Sixth Amendment provides a defendant the right to put before the jury evidence that might influence the determination of guilt. Pennsylvania v. Ritchie, 107 S. Ct. 989, 1001 (1987); see also, Webb v. Texas, 409 U.S. 95 (1972). This guarantee is meaningless if a defendant can be prevented from putting the exculpatory testimony of the alleged victim before the jury.

Here, Mr. Palladino went from being a

mere victim (when the government wanted the testimony of his attorney), to a perjurer (when the defense first mentioned that he was an appropriate witness), to a pornographer, tax cheat, associate of the Patriarca family of La Cosa Nostra and interstate racketeer (when the defense attempted to present him as a defense witness). To suggest that the government engaged in a concerted effort to turn up the heat to make sure that Palladino would understand the full consequences of defense oriented testimony would be to engage in extreme understatement. See United States v. Morrison, 535 F.2d 223 (3rd Cir. 1979).

This Court should not countenance the ands, ifs, and buts that allow such a situation to be considered consistent with the demands of due process.

II. THE TRIAL COURT'S INSTRUCTION ON COUNT 12 PERMITTING CONVICTION OF THE PETITIONERS ON THE SMOOT EXTORTIONATE CREDIT COUNT FOR CONDUCT NOT ALLEGED THEREIN VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS.

The government's original indictment alleged two separate and distinct extortionate extensions of credit made to Donald Smoot in the amount of fourteen thousand dollars. Count 11 charged Ilario Zannino with the substantive crime of making one of those extensions of credit and count 12 charged Gennaro, Nicolo, Donato and Francesco Angiulo with a conspiracy to make the other. The government's opening statement included a discussion of these "separate" debts, and a claim that Smoot owed the Angiulos money "as a result of losses at [the North Margin Street] card

game".[7] See Tr. 2:59.

Long before the government presented its loanshark evidence to the jury, the defendant Zannino was severed from the trial. Smoot testified that in the spring of 1981 he owed Zannino fourteen thousand dollars as a result of his losses at the North Margin Street card game. Tr. 51:26. He claimed he would pay the weekly payment to either Donato Angiulo or John Cincotti. Tr. 51:26. He also testified that in addition to the Zannino loan, in the spring of 1981 he owed Donato Angiulo around four thousand dollars or more. See Tr. 51:41, 96. During Donald Smoot's direct testimony, at a side bar conference, the government made it clear that its position was that "there are two separate fourteen thousand

---

[7]This was an erroneous blending of the evidence, since Smoot testified it was the Zannino loan that originated in the North Margin Street card game.

dollar loans." Tr. 51:68-69. The defense position was that the same tape recording, enhancement 675, that convinced the government that there were two loans, actually indicated that there was only one loan, and that it was made by Zannino. See Tr. 51:73-74, 77. The court examined the government's transcripts of the tape recordings on this issue and concluded that the jury could decide either that there was one or two fourteen thousand dollar loans. See Tr. 51:80-81. Smoot was then not cross examined on the Zannino loan.

In resisting the defendants' Rule 29 argument that the government's case depended on its ability to prove a second fourteen thousand dollar loan, the government insisted that it had proved two loans, a Zannino and an Angiulo loan both in the amount of fourteen thousand dollars. See Tr. 121:22, 30-31.

In closing, the government again blended the evidence of the Angiulo loan with the evidence of the Zannino loan, claiming that Smoot borrowed money from Donato Angiulo as a result of losses at the North Margin Street card game. See Tr. 122:115-16. The government told the jury that the specific charge in the indictment concerned the fourteen thousand dollar debt discussed in enhancement 675. See Tr. 122:117. The government argued that Frank Angiulo was the accountant for both loans. See Tr. 122:118.

The defendants argued to the jury that the Zannino loan was not the loan charged in the indictment and that there was no second fourteen thousand dollar loan. See Tr. 124:91-93. In rebuttal the government insisted, referring again to enhancement 675, that there was a second fourteen thousand dollar loan. See Tr. 126

(p.m.):46.

The jury, of course, was not read or given Count 11 to decide. The trial court in explaining Count 12 to the jury said,

> "There are two elements which must be proved in order for you to find the charged defendants guilty of the offense charged in Count 12. The government must prove each of these elements beyond a reasonable doubt.
>
> First. That the conspiracy to make an extortionate extension of credit to Donald Smoot in the amount of $14,000 was willfully formed and existed at or about the time alleged in the indictment. And that it is from on or about March 1981 up to and including May 1981; and
>
> Second. That the defendant under your consideration willfully and knowingly became a member of that conspiracy". Tr. 127:83-84.

The problem with this instruction was that it completely submerged the issue of whether the government had proved a second fourteen thousand dollar loan, separate and apart from the Zannino fourteen thousand

dollar loan. It invited the jury to convict on proof of Angiulo participation in the Zannino loan. At the conclusion of the charge the defendants objected to the failure of the court to instruct that Count 12 did not charge the Zannino loan. See Tr. 127:140-141. The court declined to do so.

An instruction is adequate when it leaves no doubt as to the circumstances under which the crime can be found to have been committed. United States v. McMahon, 861 F.2d 8, 12 (1st Cir. 1988). The Zannino loan was not the theory on which Count 12 was indicted or tried. Few constitutional principles are more fully established than a defendant's right to be heard on the specific charge of which he is accused. Dunn v. United States, 442 U.S. 100, 106 (1979). Conviction upon a charge not made would be sheer denial of due process. DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

If not for the unfortunate coincidences of Zannino's severance (resulting in the redaction of the Zannino loan from the indictment) and of the alleged Zannino and Angiulo loans being identical in amount and the approximate time of extension, the instruction given would have clearly identified the government's theory of prosecution. But in the face of those coincidences, the trial court was obligated to differentiate Count 12 from the Zannino loan. The First Circuit's claim that the jury had the redacted indictment and a copy of the charge while true, is an exacerbating not a mitigating factor. Those documents served as a constant reminder during deliberations that a conviction could be predicated on the Zannino loan. Nor does the First Circuit's argument that the lawyers explained the issue to the jury mitigate the problem. The government mixed

the evidence on the two loans constantly. But more importantly, the law of the case comes from the Court not the lawyers. The jury was bound to follow the Court's directions. If Dunn is not to be overruled, the convictions on Count 12 can not stand.

III. THE TRIAL COURT INVADED THE PROVENCE OF THE JURY BY DECIDING IN EFFECT THAT THE GOVERNMENT HAD PROVED FIVE SEPARATE §1955 GAMBLING BUSINESSES AS A MATTER OF LAW AND REFUSING TO SUBMIT THE ISSUE FOR THE JURY'S CONSIDERATION.

In this case the trial judge apparently believed that he could decide as a matter of law that the gambling businesses that were the subject of the government's evidence were distinct and separate businesses. In so deciding, he overruled sub silentio Sanabria v. United States, 437 U.S. 54 (1978).

The fact that a given §1955 count in the indictment may have alleged a different

state law violation from that in other §1955 counts is of no moment. Under §1955, participation in a single gambling business is but a single offense, no matter how many statutes the enterprise violated. Sanabria v. United States, supra at 70-71. The allowable unit of prosecution is defined as participation in a single illegal gambling business. Id., at 70. Dividing an allowable unit of prosecution into a series of separate crime violates the double jeopardy clause. Brown v. Ohio, 432 U.S. 161 (1977).

Here it was the government's overarching theory that there was a network of component gambling operations revolving around Francesco Angiulo as the accountant and his brother Gennaro Angiulo as the boss. The failure of the trial court to appropriately focus the jury's attention on this issue of one or five businesses was

both extraordinary and prejudicial. This failure completely submerged the defendants' theory of defense to the gambling counts.

The First Circuit's test as to when the failure to give a requested theory of defense instruction amounts to error is consistent with the test employed by the Fifth and Eleventh Circuits.

> "[t]he refusal to give a particular requested instruction is reversible error only if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense."

United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984) (quoting from United States v. Grissom, 645 F.2d 461, 464 (5th Cir. 1981).

See also United States v. Walker, 720 F.2d 1527, 1541 (11th Cir. 1983), cert. denied 465 U.S. 1108 (1984).

However, both the Sixth and Ninth Circuits reject this approach. Reasoning that the right to have the jury instructed on a defendant's theory of the case is too basic to a fair trial, the Ninth Circuit holds that the failure to instruct on a theory where there is evidence to support it is reversible per se. United States v. Escobar De Bright, 742 F.2d 1196, 1201 (9th Cir. 1984). See also United States v. Duncan, 850 F.2d 1104, 1117-1118 (6th Cir. 1988), cert. denied, 110 S.Ct. 732 (1990). In the Sixth or Ninth Circuits the failure to give the one business only defense instruction would have resulted appropriately in a finding of reversible error.

IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF MISTAKEN VOICE IDENTIFICATIONS.

The petitioners in the case at bar requested instructions (1) that voice identification testimony must be received with caution and scrutinized with care; (2) that the government must prove beyond a reasonable doubt the identity of an alleged perpetrator; (3) that a witness may be impeached by prior inconsistent statements. See Defendant Donato Angiulo's Proposed Jury Instructions Nos. 4 and 7. At the conclusion of the charge the petitioners objected to the court's failure to give these instructions. See Tr. 127:140, 142.

The identification instruction requested here is the recommended one in the First Circuit. See United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978). The failure to give it was seriously compounded

by the failure to direct the jury's attention to the factors to be weighed in assessing Agent Quinn's credibility.

The petitioners' sole argument in closing to the jury on the numbers betting count was the question of voice identification. See Tr. 124:57, 61-65. The trial court's decision to deny the petitioners an instruction on their theory of the case effectively removed that issue from the jury's consideration.

As discussed in section III above, this omission would not be tolerated in the Sixth or Ninth Circuits. It should be reversible error to fail to present the defense theory adequately in a full statement of the law when there is an adequate factual basis. See Bird v. United States, 180 U.S. 356, 361 (1901).

Here the First Circuit concedes the factual basis for the defense theory, but

ironically claims that defense counsel's closing argument in effect was an adequate substitute for proper instructions from the court.[8] This type of claim has been rejected by the Sixth Circuit. United States v. Duncan, supra, at 1117-1118.

Because the petitioners were entitled to a theory of defense instruction and did not receive it, their convictions should be reversed.

V. THE "PATTERN OF RACKETEERING ACTIVITY" ELEMENT OF THE RICO STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The due process clause of the Fifth Amendment to the United States Constitution prohibits the prosecution of a

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[8] Apparently the First Circuit believes that if you argue the defense vigorously there's no need for an instruction; but if you fail to argue it vigorously, then it was not important enough as an issue to seriously impair the defense. See the First Circuit's analysis of the "one business" only defense.

person pursuant to a statute whose terms are so vague that he must guess at their meaning. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

RICO, of course, does not contain a definition of the term "pattern of racketeering activity." All that is said in the statute is that a pattern "requires" at least two acts. This Court and the courts of appeals have struggled to fill in the interstices left by Congress. E.g. H.J. Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S.Ct. 2893 (1989); Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

In Northwestern Bell, the Court noted "the plethora of different views expressed by the courts of appeals since Sedima [S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)]" and observed that "... developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." ___ U.S. at ___, 109 S.Ct. at 2899. The Court resorted to lexicography, analogy to other provisions of the Organized Crime Control Act of 1970, and canvassing the legislative history to complete its analysis. It concluded that the concept of pattern embodies two distinct requirements -- (1) the predicate acts must be related to one another, and (2) there must be continuity among the predicate acts, or at least the threat of continuity. Recognizing that the phrase "continuity plus relationship" does not fully explicate the meaning of the term "pattern of racketeering

activity," the Court conceded that the "limits of the relationship and continuity concepts ... cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." ___ U.S. at ___, 109 S.Ct at 2902.[9]

Justice Scalia, joined by three other Justices, concurred, but argued that the majority's opinion does little more than substituting one slogan -- continuity plus relationship -- for another -- pattern of racketeering activity. Justice Scalia found the majority opinion interpreting the

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[9] In rejecting an earlier challenge to the RICO statute, the Ninth Circuit observed that if the statute failed to provide a satisfactory definition of the term "pattern of racketeering activity," the statute would not survive a vagueness challenge. United States v. Campanale, 518 F.2d 352, 364, cert. denied, 423 U.S. 1050 (1975). After Sedima and Northwestern Bell, it is clear that the statute does not fulfill this constitutional requirement.

"enigmatic term" to be inadequate. ___ U.S. at ___, 109 S.Ct. at 2906. However, Justice Scalia conceded that he was unable to offer any interpretation of "pattern" that gives more guidance concerning its meaning and application. He also speculated that RICO might not survive a constitutional challenge on vagueness grounds because of this serious ambiguity. ___ U.S. at ___, 109 S.Ct. at 2908.

Even this Court's recent efforts to inform the ambiguous, undefined phrase "pattern" may not be enough to give ordinary people fair notice that their conduct might be deemed to be a pattern. It is not enough for the congressional intent to be apparent elsewhere if it is not apparent by examining the language of the statute. "It would be hard to hold that, in advance of any judicial utterance upon the subject, [the defendants] were bound to understand the

challenged provision according to the language later used by the court." Lanzetta v. New Jersey, 306 U.S. 451, 456 (1939).

As to petitioner Donato Angiulo the two predicate acts on which he was convicted bore no relationship to each other. As to Gennaro and Francesco Angiulo, the general RICO verdict returned makes it impossible to determine which predicates formed a pattern in the jury's mind. Under the circumstances, the petitioners would have had to speculate about whether their conduct fell within the parameters of the RICO statute. Because the statute furnishes no guide by which one can reasonably determine whether conduct may be penalized as a pattern by the RICO statute, the trial court erred in denying the petitioners relief. Accordingly, this Court should grant the petition to decide whether RICO may be applied to predicate acts which are not related to each other, but only to

the alleged enterprise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Nos. 90-16 and 90-46

In the Supreme Court of the United States

OCTOBER TERM, 1990

SAMUEL S. GRANITO, PETITIONER

v.

UNITED STATES OF AMERICA

GENNARO ANGIULO, FRANCESCO ANGIULO, DONATO ANGIULO, AND MICHELE ANGIULO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Granito's RICO convictions must be reversed because the court of appeals found that the evidence was insufficient to support one of the predicate acts of racketeering charged against him.

2. Whether the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.

3. Whether the district court erred in refusing to order immunity for a prospective defense witness.

4. Whether the district court erred in declining to give a requested jury instruction distinguishing between the extortionate extension of credit charged against petitioners Gennaro, Francesco, and Donato Angiulo in one count and the extortionate extension of credit charged against a severed co-defendant in another count.

5. Whether the district court erred in declining to instruct the jury that it could find one overall gambling business instead of the five separate gambling businesses charged in the indictment.

6. Whether the district court erred in declining to give the voice identification instruction requested by petitioners.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Brennan v. *United States*, 867 F.2d 111 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989) . 8-9, 12

Callanan v. *United States*, 881 F.2d 229 (6th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990) 11

Connally v. *General Construction Co.*, 269 U.S. 385 (1926) 13-14

Government of the Virginia Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980) 17

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 13

H.J. Inc. v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989) 12, 13, 14, 15

Kolender v. *Lawson*, 461 U.S. 352 (1983) 14

Mattheson v. *King*, 751 F.2d 1432 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986) 16

McCullough v. *United States*, cert. denied, 484 U.S. 947 (1987) 12

Parker v. *Levy*, 417 U.S. 733 (1974) 13

Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983) 16

Cases – Continued: Page

Sanabria v. *United States*, 437 U.S. 54 (1978) 21
Street v. *New York*, 394 U.S. 576 (1969) 8
Stromberg v. *California*, 283 U.S. 359 (1931) 7
United States v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980) 13
United States v. *Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976) 17
United States v. *Anderson*, 809 F.2d 1281 (7th Cir. 1987) 9
United States v. *Brown*, 583 F.2d 659 (3d Cir. Cir. 1978), cert. denied, 440 U.S. 909 (1979) 12
United States v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976) 17
United States v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) 13
United States v. *Capozzi*, 883 F.2d 608 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990) 17
United States v. *Corona*, 885 F.2d 766 (11th Cir. 1989), cert. denied, 110 S. Ct. 1838 (1990) 10-11
United States v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990) 21, 22, 23
United States v. *Durrani*, 835 F.2d 410 (2d Cir. 1987) 21
United States v. *Escobar De Bright*, 742 F.2d 1196 (9th Cir. 1984) 21

Cases – Continued: Page

United States v. *Graham*, 548 F.2d 1302 (8th Cir. 1977) 17
United States v. *Hawes*, 529 F.2d 472 (5th Cir. 1976) 13
United States v. *Holzer*, 840 F.2d 1343 (7th Cir.), cert. denied, 109 S. Ct. 315 (1989) ... 11-12
United States v. *Hooks*, 848 F.2d 785 (7th Cir. 1988) 16, 18
United States v. *Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980) 13
United States v. *Karas*, 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) ... 16
United States v. *Kragness*, 830 F.2d 842 (8th Cir. 1987), cert. denied, 109 S. Ct. 2086 1989) 9, 12
United States v. *Lopez*, 803 F.2d 969 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) ... 9
United States v. *Lord*, 711 F.2d 887 (9th Cir. 1983) 18
United States v. *Lowell*, 649 F.2d 950 (3d Cir. 1981) 18
United States v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989) 11
United States v. *Martino*, 648 F.2d 367 (5th 1981), cert. denied, 456 U.S. 943 (1982) 13
United States v. *Morelli*, 643 F.2d 402 (6th Cir.), cert. denied, 453 U.S. 912 (1981) 13
United States v. *Morrison*, 535 F.2d 223 (3d Cir. 1976) 19
United States v. *Ochs*, 842 F.2d 515 (1st Cir. 1988) 8
United States v. *Peacock*, 654 F.2d 339 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983) 9

Cases – Continued: Page

United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985) 16
United States v. *Pepe*, 747 F.2d 632 (11th Cir. 1984) 9
United States v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) 15
United States v. *Pinto*, 850 F.2d 927 (2d Cir.), cert. denied, 109 S. Ct. 174 (1988) 18
United States v. *Powell*, 423 U.S. 87 (1975) .. 13
United States v. *Pungitore*, No. 89-1371 (3d Cir. Aug. 1, 1990) 14
United States v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984) 12, 13
United States v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979) 13
United States v. *Tarantino*, 846 F.2d 1346 (D.C. Cir.), cert. denied, 109 S. Ct. 174 (1988) 21
United States v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) ... 16
United States v. *Tripp*, 782 F.2d 38 (6th Cir. 1986) 13
United States v. *Turkette*, 452 U.S. 576 (1981) 14
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) 16-17
United States v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982) 13

Cases—Continued: Page

United States v. *Walgren*, 885 F.2d 1417 (9th Cir. 1989) 11
United States v. *Weisman*, 624 F.2d 1118 (2d Cir. 1980) 15
United States v. *Westbrook*, 896 F.2d 330 (8th Cir. 1990) 21
United States v. *Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989) .. 11, 12
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 13
Yates v. *United States*, 354 U.S. 298 (1957) ... 7-8
Zant v. *Stephens*, 462 U.S. 862 (1983) 8

Constitution and statutes:

U.S. Const.:
Amend. I 13
Amend. V 15, 18
Racketeer Influenced and Corrupt Act:
18 U.S.C. 1955 ..... 2, 21
18 U.S.C. 1961 15
18 U.S.C. 1961(5) 9
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 6001 *et seq.* 16
18 U.S.C. 371 2
18 U.S.C. 892(a) 2
18 U.S.C. 894(a) 2
18 U.S.C. 1503 2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-10

SAMUEL S. GRANITO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 90-46

GENNARO ANGIULO, FRANCESCO ANGIULO, DONATO ANGIULO, AND MICHELE ANGIULO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-109a) is reported at 897 F.2d 1169.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1990, Petitions for rehearing were denied on March 26, 1990. The petitions for a writ of certiorari were filed on June 25, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Gennaro Angiulo was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); four counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Counts 3, 4, 5, 7); two counts of conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. 892(a) (Counts 12 and 13); one count each of conspiring to collect and collecting an extortionate extension of credit, in violation of 18 U.S.C. 894(a) (Counts 14 and 15, respectively); one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 18); and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count 19). Petitioner Francesco Angiulo was convicted on Counts 1 through 5, 7, and 12 through 14; petitioner Donato Angiulo was convicted on Counts 1, 2, 3, and 12; petitioner Granito was convicted on Counts 1, 2, and 4; and petitioner Michele Angiulo was convicted on Count 3.

Gennaro Angiulo was sentenced to a total of 45 years' imprisonment and $120,000 in fines; Francesco Angiulo was sentenced to 25 years' imprisonment and $60,000 in fines; Donato Angiulo was sentenced to 20 years' imprisonment and $40,000 in fines; Granito was sentenced to 20 years' imprisonment and $35,000 in fines; and Michele Angiulo was sentenced to three years' imprisonment and a fine of $5,000. The district court also ordered the forfeiture of various assets. The court of appeals reversed two parts of the forfeiture order but affirmed in all other respects. Pet. App. 1a-109a.

1. The evidence at trial showed that all five petitioners were members of the Patriarca Family of La Cosa Nostra.

Gennaro Angiulo was the underboss of the organization, in charge of its day-to-day operations. Immediately beneath him in the command hierarchy were Samuel Granito and Donato Angiulo, who were "Capo Regimes" (captains). Beneath the Capo Regimes, the organization consisted of soldiers and then of associates. Francesco Angiulo was a soldier and also served as the accountant for the organization's gambling and loansharking businesses. Michele Angiulo was an associate. Pet. App. 3a-4a.

In various combinations, petitioners participated in four illegal gambling operations. The first involved the operation by Gennaro and Francesco Angiulo of a series of "Las Vegas Nights" gambling events from approximately late 1978 to mid-1981. The events were a type of bazaar, ostensibly operated to benefit nonprofit, charitable organizations. In fact, however, the proceeds were not given to charitable organizations, but were kept by their La Cosa Nostra operators. Pet. App. 4a.

The second gambling business involved the operation, during 1980 and 1981, of twice-weekly barbooth games at the Demosthenes Democratic Social Club in Lowell, Massachusetts. Barbooth is a dice game in which, typically, 12 or more players place bets on whether the shooter of the dice will roll a winning or losing combination of numbers. The house takes a percentage of the amount bet. Gennaro Angiulo was the overseer of the operation, and Francesco Angiulo was the accountant. Pet. App. 5a.

The third gambling business was an extensive, illegal numbers-betting operation in the Boston area. Approximately 180 people were involved in the operation, including agents who collected the bets, "sub-books" who controlled the agents and paid the winning bettors, and office managers who supervised the day-to-day operation of the business and settled accounts with the sub-books. Gen-

naro Angiulo was the principal owner and overall boss of the operation. Francesco Angiulo was the day-to-day supervisor. Donato Angiulo controlled a number of sub-book operations and was responsible for collecting money. Michele Angiulo stood in for Francesco and also assisted in controlling several of the sub-book operations. Pet. App. 5a.

The final gambling business involved high-stakes poker games in which Gennaro Angiulo and Granito had a financial interest. Gennaro Angiulo was the overall boss of the operation, and Francesco Angiulo served as the accountant. Pet. App. 6a.

In addition to their gambling operations, Gennaro, Donato, and Francesco Angiulo engaged in loansharking. For example, in 1981 Donald Smoot, a regular player in the poker games, owed Donato Angiulo $14,000 at an interest rate of two and a half percent per week. Joseph Palladino owed the Angiulos $200,000, paid interest at the rate of one percent per week, and eventually satisfied the debt by transferring real estate to the Angiulos. Pet. App. 6a-7a.

Petitioners also engaged in a series of conspiracies to obstruct justice and commit murder. During the 1950s and 1960s, Edward, William, and Walter Bennett were loansharks and bookmakers who came into conflict with Gennaro Angiulo and codefendant Ilario Zannino. In January 1967, Edward Bennett disappeared; in April 1967, Walter Bennett likewise disappeared; and in December 1967, William Bennett was shot to death. In an intercepted conversation in 1981, Gennaro Angiulo and Zannino recounted how Zannino, with the help of an accomplice, killed the Bennetts at Gennaro's direction. Gov't C.A. Br. 28-29.

In 1976, Gennaro Angiulo had his associates kill Joseph Barboza, who had testified against Gennaro and other members of his organization in several prosecutions. Gov't

C.A. Br. 29-30. In early 1981, Gennaro conspired with others to kill Walter LaFreniere in order to prevent him from testifying before a federal grand jury about the Angiulo organization. Also in early 1981, Gennaro Angiulo and Granito engaged with others in a conspiracy to kill Angelo Patrizzi, who they believed was planning to kill two members of the Patriarca Family as revenge for the 1978 murder of Patrizzi's half-brother. In June 1981, Patrizzi's decomposed body was found in the trunk of a stolen car. Pet. App. 7a-8a.

2. The court of appeals affirmed the convictions. Petitioners contended, first, that their RICO convictions had to be reversed because the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague. In rejecting that claim, the court concluded that, whatever doubts there may be about the "precise reach of the statute in marginal fact situations not currently before [the court]," there could be no doubt on the part of a person of ordinary intelligence that petitioners' conduct was proscribed, because "the murder conspiracies and the gambling and loansharking operations for which the defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO." Pet. App. 12a-13a. The court also held that the predicate acts charged against petitioner Granito, all of which were carried out to further the aims of the same RICO enterprise (the Patriarca Family), clearly constituted a "pattern" within the meaning of the RICO statute. *Id.* at 15a.

Second, the court rejected the Angiulos' contention that the district court erred in refusing to order immunity for prospective defense witness Joseph Palladino. The court expressed "substantial reservations" about the notion that judges have inherent power to grant defense-witness immunity. In any event, however, the court concluded that a

grant of immunity to Palladino would not have been appropriate because the government had "significant" reasons for withholding immunity: to protect possible future federal and state prosecutions of Palladino for engaging in organized criminal activities. Pet. App. 43a. The court also found no government misconduct with respect to Palladino of a sort that might warrant a court order requiring the government to grant Palladino statutory immunity. *Id.* at 43a-47a.

Third, although the court found the evidence insufficient to support one of the predicate acts of racketeering charged against Granito (being an accessory to the Patrizzi murder), the court upheld Granito's RICO convictions on the ground that the jury necessarily found him guilty of conspiring to kill Patrizzi and participating in the poker game operation, the other two predicate acts alleged against him. Pet. App. 54a-65a.

Next, the court upheld the district court's refusal to instruct the jury that the testimony of an FBI agent, who had identified petitioners' voices in tape-recorded conversations, must be "received with caution and scrutinized with care." The court of appeals explained that the general jury instructions, when considered in the context of the charge as a whole, adequately covered the issues raised by the requested voice-identification instruction, and that the district court's failure to give the instruction did not impair petitioners' ability to present their voice-identification defense. Pet. App. 80a-81a.

Fifth, petitioners contended that the district court should have instructed the jury that it could find that petitioners' various gambling operations constituted only a single overall gambling business, rather than five separate gambling businesses, as charged in the indictment. The court of appeals found "little or no evidentiary grounds to warrant instructing the jury on the 'one business only' theory." Pet. App. 84a.

Finally, the court rejected the Angiulos' contention that the jury instruction on Count 12 (which charged Gennaro, Francesco, and Donato Angiulo with making an extortionate loan of $14,000 to Donald Smoot), failed adequately to differentiate the Angiulos' loan from a distinct $14,000 loan to Smoot made by Zannino (which was initially charged in Count 11 and later deleted from the indictment when Zannino was severed from the trial). The court concluded that the instructions, as given, were "sufficiently clear to eliminate any likelihood that the jury would confuse the Zannino loan (count 11) with the Angiulo loan (count 12)." Pet. App. 89a.[1]

ARGUMENT

1. Petitioner Granito challenges (Pet. 16-26) the court of appeals' affirmance of his RICO convictions after the court found the evidence insufficient to support one of the predicate acts charged against him. Contending that the jury may have improperly relied on the invalid predicate act in convicting him, petitioner claims that this case falls within the rule that when the jury is instructed that it may convict on one of several grounds, and one of those grounds is later determined to be insufficient, the conviction must be reversed if the reviewing court is not certain that the jury's verdict rested on a valid ground. See *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931) (reversing when "so far as the record discloses" the conviction may have rested on an invalid ground); *Yates* v.

[1] Petitioners also unsuccessfully challenged the impartiality of the jury, Pet. App. 15a-32a, a variety of evidentiary and procedural rulings, *id.* at 32a-39a, 47a-53a, the sufficiency of the evidence on certain counts, *id.* at 65a-67a, and certain other aspects of the jury charge, *id.* at 67a-77a, 85a-87a, 89a-91a. Petitioners do not renew those claims in this Court.

United States, 354 U.S. 298, 312 (1957); *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); see generally *Zant* v. *Stephens*, 462 U.S. 862, 880-884 (1983).

The court of appeals acknowledged the general rule on which petitioner relies. But the court correctly concluded that that rule is not controlling when "uncertainty as to the ground upon which the jury relied can be eliminated," such as "where a verdict based on any ground would mean that the jury found every element necessary to support a conviction on the sufficient ground." Pet. App. 63a-64a, quoting *United States* v. *Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). Applying those principles, the court concluded that the jury here necessarily found that petitioner committed the two predicate acts charged in the indictment that were sufficiently supported by the evidence.[2]

Granito was charged with three predicate acts under RICO: gambling; being an accessory to the Patrizzi murder; and conspiring to murder Patrizzi. The predicate act of gambling was also charged as a separate substantive crime. The court first noted that the jury's conviction of Granito on the gambling count removed all doubt that the jury also found him guilty on the corresponding predicate act of gambling. Pet. App. 62a. See *Brennan* v. *United States*, 867 F.2d 111, 114 (2d Cir.) (guilty verdicts on separately charged crimes paralleling the RICO predicate acts

[2] Although the court of appeals did not have to reach the issue, there is reason to doubt that the *Street-Stromberg-Yates* analysis applies in a case such as this, where the evidence as to one of the predicate acts is factually insufficient but the charge is not legally defective. In these circumstances, it is reasonable to assume that the jury acted rationally in convicting on the basis of the predicate acts that were supported by the evidence and not on the basis of the predicate act that was not sufficiently proved. In that respect, this case is quite different from *Street*, *Stromberg*, and *Yates*, where the jury could rationally have relied on an impermissible theory, not having any basis for knowing that it was legally defective.

"operated like special verdicts" showing the jury's finding of guilt on the predicate acts), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Kragness*, 830 F.2d 842, 861 (8th Cir. 1987), cert. denied, 109 S. Ct. 2086 (1989); *United States* v. *Anderson*, 809 F.2d 1281, 1284-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 976-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 688 (11th Cir. 1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

The court also reasoned that because a RICO "pattern" requires "at least two acts of racketeering activity," 18 U.S.C. 1961(5), the jury also must have found Granito guilty of conspiring to murder Patrizzi, being an accessory to his murder, or both. Pet. App. 62a. If the jury found Granito guilty of conspiracy, the court observed, his RICO convictions would of course be valid; the evidence sufficiently established conspiracy. But the court rejected Granito's surmise that "the jury may have found him guilty on accessory, but not on conspiracy." *Id.* at 64a. Although the court found the evidence insufficient in one respect to support the accessory charge,[3] the court ex-

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[3] There was no doubt about the sufficiency of the evidence to establish Granito's role in the murder. In a tape-recorded conversation, Granito described a murder attempt on Patrizzi, stating: "We had [Patrizzi] ready last Friday. Oh, we had him Friday cause he said 'c'mon we'll go for coffee.' We had a place. We're gonna take him in a house and strangle him . . . ." Gov't C.A. Br. 32; see also *id.* at 33 (describing Granito's agreement to procure a telephone number that could be used to identify Patrizzi's whereabouts in order to murder him). The source of doubt with respect to the accessory charge was whether Frederick Simone was a principal in that murder. Pet. App. 55a-60a. The court recited ample evidence that Granito planned the murder and engaged in attempts to commit it, *id.* at 58a, but concluded that "[w]hether Simone participated in the actual murder is wholly unclear from the evidence," *id.* at 60a.

plained that if the jurors found Granito guilty of being an accessory to Patrizzi's murder, they necessarily must have found him guilty on the charge of conspiring to kill Patrizzi, thus supplying the second valid predicate act.

> If the jury convicted Granito as an accessory, by finding that [Frederick] Simone was a principal in the Patrizzi murder and that Granito had incited, procured, counseled, hired and commanded Simone to commit the murder, they must necessarily have accepted the government's interpretation of the pertinent tape-recorded conversations involving Simone, Granito, Gennaro Angiulo, and Zannino. These same conversations, and virtually the same government interpretation, were at the heart of the conspiracy charge against Granito, which alleged that Granito had conspired with Zannino, Simone, and Gennaro Angiulo to kill Patrizzi.

Pet. App. 64a-65a. The court thus concluded that "[b]ecause the facts and the elements underlying the two charges were so intertwined, if the jury found Granito guilty as an accessory, they must also have found him guilty of conspiracy." [4] *Id.* at 65a.

The court of appeals' affirmance of Granito's RICO convictions, after its determination that the jury necessarily found the requisite predicate acts, is fully consistent with the analysis employed in similar settings by other courts of appeals. See *United States* v. *Corona*, 885 F.2d

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[4] Granito argues (Pet. 24) that it would not necessarily be inconsistent, in a particular case, for a jury to convict a defendant of being an accessory to a crime and to acquit him of conspiring to commit the crime. But the court of appeals understood the different elements of the two crimes, Pet. App. 62a n.16; it simply concluded, on the facts of this case, that a rational jury could not have found Granito guilty of being an accessory without finding every element required to convict him of conspiracy.

766, 775 (11th Cir. 1989) (allegations on invalid mail fraud counts and valid Travel Act counts "were so intertwined that jury could not reasonably have found that [the defendant] performed the mail fraud but not the Travel Act conduct"), cert. denied, 110 S. Ct. 1838 (1990); *Callanan* v. *United States*, 881 F.2d 229, 234-235 (6th Cir. 1989) (co-defendant's conviction on RICO charges based on bribery established that the jury found that defendant committed valid bribery predicates; therefore, invalid mail fraud predicate acts did not require reversal), cert. denied, 110 S. Ct. 1816 (1990); *United States* v. *Zauber*, 857 F.2d 137, 151-154 (3d Cir. 1988) (instruction required jury to find kickbacks; hence, submission of invalid predicate acts of mail fraud did not require reversal of RICO charge), cert. denied, 109 S. Ct. 1340 (1989).

Contrary to Granito's contention (Pet. 18), there is no conflict among the courts of appeals over the proper disposition of RICO convictions when one predicate act is found invalid. In the cases cited by Granito, the courts reversed RICO convictions only after finding that it was unclear whether the jury had found two valid predicate acts. The court of appeals noted those holdings, Pet. App. 63a, but properly found them inapplicable in a case like this one. See *United States* v. *Walgren*, 885 F.2d 1417, 1426 (9th Cir. 1989) (court could not conclude that mail fraud conviction on "intangible rights" theory constituted a jury finding that defendant was guilty of a state bribery offense not charged in the indictment); *United States* v. *Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988) (RICO conviction vacated because "we may not know whether the [intangible rights] mail fraud or the bribery charges * * *, or both, were considered by the jury"), cert. denied, 109 S. Ct. 3190 (1989); *United States* v. *Holzer*, 840 F.2d 1343, 1350-1352 (7th Cir.) (recognizing that a RICO conviction must be upheld even when one predicate act is invalid if a

rational jury necessarily found sufficient predicate acts, but finding that principle inapplicable on a particular record), cert. denied, 109 S. Ct. 315 (1988); *United States* v. *Kragness*, 830 F.2d at 861 ("we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed"); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.) (invalid predicate act had no relationship to other predicate acts charged), cert. denied, 469 U.S. 831 (1984).[5]

2. Petitioners contend (90-10 Pet. 26-29; 90-46 Pet. 49-55) that the "pattern of racketeering activity" element of a RICO offense is unconstitutionally vague. They rely on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2906-2909 (1989), in which Justice Scalia, joined by three other Justices, ex-

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[5] Granito also relies (Pet. 18) on *United States* v. *Brown*, 583 F.2d 659, 669-670 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), in which the court, pursuant to a government concession, reversed the defendant's RICO conviction following the invalidation of two predicate mail fraud violations. Based on a conflict between *Brown* and cases from other circuits, Justices White and Brennan would have granted certiorari in *McCullough* v. *United States*, cert. denied, 484 U.S. 947 (1987). But the Third Circuit subsequently narrowed *Brown*, explaining that the RICO conviction there had to be reversed because "it was impossible to determine whether the jury had relied on invalid predicate acts." *United States* v. *Zauber*, 857 F.2d at 154. In *Zauber* itself, the Third Circuit joined other courts of appeals in holding that a reviewing court must consider whether the record discloses that the jury necessarily relied on a valid ground for its verdict. In light of *Zauber*, the conflict noted in *McCullough* has disappeared. See *Brennan* v. *United States*, 867 F.2d at 116 (discussing *Brown* and *Zauber* and concluding that "there appears to be no conflict with respect to" the disposition of RICO convictions where one predicate is found invalid); *United States* v. *Holzer*, 840 F.2d at 1351 (finding no conflict because of the court's prediction that the Third Circuit would adopt the rule later embraced in *Zauber*).

pressed doubts about whether the RICO "pattern" element could withstand a constitutional vagueness challenge.[6]

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). To sustain such a vagueness attack, the defendant must show that the stattute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Connally* v. *General Construction Co.*,

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[6] In *H.J. Inc.*, this Court clarified that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." 109 S. Ct. at 2900. Prior to *H.J. Inc.*, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See *United States* v. *Tripp*, 782 F.2d 38, 41-42 (6th Cir. 1986); *United States* v. *Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied. 456 U.S. 943 (1982); *United States* v. *Uni Oil, Inc.*, 646 F.2d 9346, 949-953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Huber*, 603 F.2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F.2d 472, 478-479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

269 U.S. 385, 391 (1926). In this case, the court of appeals correctly concluded that petitioners "have not even come close to making this showing[.]" Pet. App. 13a.[7]

Congress drafted the RICO statute to cover a wide range of criminal activity, but "[o]rganized crime was without a doubt Congress' major target[.]" *H.J. Inc.*, 109 S. Ct. at 2904. See also *United States* v. *Turkette*, 452 U.S. 576, 588-593 (1981). Given RICO's central purpose of combatting organized crime, persons of reasonable intelligence have ample notice that the statute reaches the commission of repeated criminal acts—such as murder, gambling, and loansharking—that are aimed at furthering the goals of a La Cosa Nostra family. As the court of appeals concluded, "[a] person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of RICO's pattern of racketeering activity." Pet. App. 13a. In rejecting a similar vagueness challenge, the Third Circuit recently reached the same conclusion, stating: "[T]he application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case." *United States* v. *Pungitore*, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. 27.

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[7] The Court has noted "the more important aspect of the vagueness doctrine 'is not actual notice, but * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Petitioners, who are associated with precisely the type of organized crime family that RICO was principally designed to attack, do not suggest that the RICO statute failed to give the government sufficient guidelines to use in determining whether to prosecute them for racketeering violations.

Petitioner Donato Angiulo and Granito further claim (90-46 Pet. 54; 90-10 Pet. 28-29) that they lacked fair notice that their varied criminal acts satisfied the "relatedness" aspect of RICO's pattern requirement. See *H.J. Inc.*, 109 S. Ct. at 2900-2901. That contention is without merit. In enacting RICO, Congress recognized that organized criminals engage in "diversified" activities such as "syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation." 18 U.S.C. 1961 note (Congressional Statement of Findings and Purpose). Accordingly, courts have uniformly held that the requisite relatedness of predicate acts is established when each act benefits or furthers the goals of the same criminal enterprise. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir. 1980) ("the enterprise itself supplies a significant unifying link between the various predicate acts"). Since the predicate acts committed by petitioners advanced the cause of a single organized crime family, there can be no serious contention that petitioners lacked notice that they were subject to RICO liability for their conduct.

3. The Angiulos next contend (Pet. 33-35) that the district court erred in denying a motion to grant immunity for a prospective defense witness, Joseph Palladino.[8] Peti-

[8] At trial, the defense stated that it wished to call Palladino, one of the Angiulos' loansharking victims, to testify that he was not a loansharking victim at all, but rather a party to a legitimate business transaction with the Angiulos. After unsuccessfully moving to restrict the government's cross-examination of Palladino to his alleged status as a loansharking victim, the defense moved for immunity for Palladino, claiming that, absent immunity, Palladino would assert his Fifth Amendment privilege and refuse to testify. The district court denied the motion, and Palladino did not testify. Pet. App. 39a.

titioners urge that immunity should have been granted on one of two theories: first the district court should have granted Palladino immunity because his testimony was essential for an effective defense; second, the district court should have ordered the government to grant statutory immunity to Palladino to prevent the government from deliberately distorting the fact-finding process. The court of appeals properly rejected both arguments. Because the court assumed the validity of the underlying theories but found their requirements not satisfied in this case, the court's decision does not conflict with any decision of any other court of appeals.

a. In our view, the district court did not have authority to immunize Palladino absent a request from the government. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to seek immunity in the Executive Branch, not the Judiciary. In discussing the immunity statutes, this Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). Strong separation-of-powers concerns counsel against the assertion of judicial power to make immunity decisions for the government. Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[9]

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[9] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077

The Third Circuit alone has held that immunity may be granted on the court's initiative, where it is necessary to protect the defendant's efforts to mount his defense. That court has narrowly limited the scope of that rule, however:

> [I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

Government of the Virgin Islands v. *Smith*, 615 F.2d 964, 972 (1980). Even assuming that Palladino's testimony could be characterized as essential and exculpatory, the defense was not entitled to immunity for Palladino under the *Smith* approach. As the court of appeals explained, "[u]nlike in *Smith*, the government here *has* presented a number of significant reasons for withholding immunity." Pet. App. 43a. The government indicated that granting Palladino immunity would impede possible future prosecutions of Palladino for involvement in organized crime activities, for tax violations, and for violations of state law. *Ibid.* Indeed, the government advised the court that at that very moment, Palladino was the subject of an IRS investigation arising from business and real estate transactions related to the charges in that case. Gov't C.A. Br. 101. The court of appeals correctly concluded that "[t]hese reasons certainly are adequate to constitute a strong governmental interest in withholding immunity." Pet. App. 43a. There is no reason to believe the Third Circuit

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(1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976). See also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990).

would have decided the question differently. See *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (upholding denial of defense witness immunity in part because government "may yet" prosecute witness for whom immunity was sought).

b. Nor was statutory immunity for Palladino required in order to prevent deliberate distortion of the fact-finding process. The courts that have addressed that theory have held that district courts may compel the government to immunize defense witnesses in only two circumstances: where government intimidation provokes a defense witness into invoking his Fifth Amendment privilege, thereby withholding testimony that otherwise would have been available to the defense, or where the government withholds immunity from a defense witness for the purpose of keeping exculpatory evidence from the jury. See, *e.g.*, *United States* v. *Pinto*, 850 F.2d 927, 932 (2d Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States* v. *Hooks*, 848 F.2d 785, 799 (7th Cir. 1988); *United States* v. *Lord*, 711 F.2d 887, 891 (9th Cir. 1983). In the court of appeals, petitioners argued that the government intimidated Palladino by (1) informing the court that it thought Palladino would lie if he testified; (2) transmitting pertinent information on Palladino to the IRS; (3) reciting to the court the criminal activities of which it suspected Palladino; and (4) notifying Palladino, through the IRS, that he was under investigation for possible tax violations. As the court of appeals correctly concluded, however, "[n]one of this conduct is sufficient to warrant a finding of witness intimidation by the prosecution." Pet. App. 45a.

First, the government's statements that it thought Palladino would testify falsely and its enumeration of his suspected crimes were not calculated to intimidate him; those statements were directed not to Palladino but to the court. The government properly made those statements in

order to explain why it had declined to grant Palladino statutory immunity. Second, there was nothing improper about the prosecution's transmission of information to the IRS; investigative arms of the government frequently share information in which they have a mutual interest. Finally, the prosecution did not suggest to the IRS that it contact Palladino, nor does the record show the prosecution was even aware the IRS would do so. As the court of appeals observed, the defense "ha[s] not pointed to any direct communication between the prosecution and Palladino," or "established the requisite nexus between the government's conduct and Palladino's decision not to testify." Pet. App. 46a. Compare *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976) (intimidation found where prosecution repeatedly warned prospective witness that she was liable to prosecution on drug charges, that if she testified her testimony could be used against her, and that federal prejury charges could be brought if she lied).

Nor is there any basis for believing that the prosecution declined to grant Palladino immunity for the purpose of keeping exculpatory testimony from the jury. As previously discussed, the government provided valid reasons for its objection to immunizing Palladino, including his suspected involvement in other criminal activities and the government's desire not to hinder possible state and federal prosecutions. The court of appeals explained that "[t]hese reasons clearly show that the government's conduct was motivated by something other than the sole desire to keep Palladino's exclupatory testimony from the jury." Pet. App. 47a.

4. Petitioners contend (90-46 Pet. 36-43) that the district court erred in failing to give a jury instruction distinguishing between two extortionate loans that were made to the same victim. Count 11 of the initial indictment charged co-defendant Zannino with making an extortionate $14,000

loan to Donald Smoot. Count 12 of the indictment charged petitioners Gennaro, Francesco, and Donato Angiulo with making a separate extortionate loan to Smoot, also in the amount of $14,000. Shortly after opening statements, Zannino's trial was severed from that of petitioners, and Count 11 was deleted from the indictment. Petitioners' defense to Count 12 was that only one $14,000 loan was made to Smoot, and that it was made by Zannino, acting alone. Petitioners argue that the district court committed reversible error by refusing to give a requested jury instruction informing the jury that Count 12 did not relate to the Zannino loan. Pet. App. 88a.

As the court of appeals correctly concluded, "[a]lthough the court did not give the precise instruction requested by [petitioners], the careful instructions that were given more than adequately covered the situation." Pet. App. 89a. The district court explicitly instructed the jury that Counts 7 through 11 had been deleted from the indictment as a result of Zannino's severence. Furthermore, the court read Count 12 to the jury and reviewed each of the elements of the charge. In so doing, the court explicitly named Gennaro, Francesco, and Donato Angiulo as the defendants who were charged with the loan. Finally, the redacted indictment together with written copies of the entire charge were provided to the jury. *Ibid.* In light of these circumstances—and the fact that Smoot's testimony and the opening and closing arguments clearly reflected the separateness of the two loans (see Gov't C.A. Br. 103-104)—petitioners' proposed instruction was not necessary to prevent jury confusion about the subject matter of Count 12.

5. The Angiulos contend (Pet. 43-46) that the district court committed reversible error in failing to give an instruction permitting the jury to decide how many gambling businesses petitioners operated. The indictment charged, both as predicate acts of racketeering in the

RICO counts and as separate substantive offenses, that petitioners engaged in five distinct gambling businesses. Petitioners asked for an instruction that the jury could find that these operations formed only one overall gambling business.

The district court properly declined to give the "one business only" instruction, because the evidence did not support it. A trial court is required to give an instruction on the theory of the defense "only if the evidence provides some foundation for it." *United States* v. *Durrani*, 835 F.2d 410, 419-420 (2d Cir. 1987); *United States* v. *Tarantino*, 846 F.2d 1384, 1400 (D.C. Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States* v. *Westbrook*, 896 F.2d 330, 337 (8th Cir. 1990). The government introduced evidence at trial showing that petitioners' gambling businesses, each of which involved a different type of gambling, were conducted over different time periods, held in different locations, and operated by different managers and personnel. Pet. App. 84a. Petitioners point to nothing in the record indicating that their gambling operations constituted one business. Indeed, as the court of appeals noted, the "paucity of * * * references [to the theory at trial] undercuts any argument that the issue was of such importance that the failure specifically to instruct on it seriously impaired a given defense." *Ibid.*[10]

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[10] Contrary to petitioners' apparent contention (90-46 Pet. 43-44) nothing in *Sanabria* v. *United States*, 437 U.S. 54 (1978), suggests that a defendant is always entitled to a "one business only" instruction. The Court in *Sanabria* noted only that under 18 U.S.C. 1955, participation in a single gambling business is but a single offense, 437 U.S. at 70-71; the opinion does not require that the issue be put to the jury where the uncontradicted evidence shows multiple gambling businesses. Nor are petitioners correct in contending (90-46 Pet. 46) that the result here conflicts with the decisions in *United States* v. *Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984), and *United States* v. *Duncan*, 850

6. Finally, the Angiulos contend (Pet. 47-49) that the district court erred in refusing to give specific instructions regarding voice-identification testimony. The government's evidence at trial consisted in considerable part of tape-recorded conversations obtained through court-authorized electronic surveillance. An FBI agent testified about how the recordings were acquired, and he identified petitioners' voices on the tapes. At the close of the evidence, the defense asked the district court to instruct the jury that the agent's testimony about the voice identifications must be "received with caution and scrutinized with care," and that "[t]he government's burden of proof extends to every element of each crime charged, including the burden of proving beyond a reasonable doubt the identity of an alleged perpetrator of an offense." Pet. App. 78a.

Although the district court declined to give the specific instruction requested by petitioners, the requested instruction was substantially covered by the court's charge. The court gave a general instruction on witness credibility, informing the jury that it must determine the credibility of each witness's testimony. The court also instructed the jury that the written transcripts of the tape recordings introduced by the government had no independent evidentiary value and were to be used only to help the jury discern the words on the tapes. Finally, the court repeatedly emphasized in its charge the government's burden of proof as to each element of the crimes charged. As the court of appeals observed, "[t]hese instructions put the jurors on notice that they were to listen to the tapes themselves and reach their own determinations, and not blindly base their

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F.2d 1104, 1117 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990). Both of those cases make clear that a theory-of-defense instruction need be given only where the asserted defense has "some foundation" (*Escobar De Bright*, 742 F.2d at 1201) or "finds some support" (*Duncan*, 850 F.2d at 1117) in the evidence; neither approach would have required petitioners' instruction on this record.

verdict on any interpretation of the tapes by government witnesses or on any government-prepared transcripts." Pet. App. 80a. Moreover, in light of the prominence given by the defense to the voice-identification issue, the court of appeals correctly concluded that "a jury receiving the court's general instructions on witness credibility, the government's burden of proof, and the limited purpose of the transcripts would understand that [the agent's] testimony was to be scrutinized with care." *Id.* at 81a.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[11] The Angiulos cite *United States* v. *Duncan*, 850 F.2d at 1117-1118, for the proposition that a closing argument by defense counsel is no substitute for a jury instruction on the theory of the defense. Pet. 48-49. But the court of appeals did not hold that the defense closing argument made up for an inadequate jury charge; rather, it held that the jury instructions given by the court were sufficient to cover the essential points raised by petitioners' request, especially when viewed in light of the whole trial, including the closing arguments.

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